

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

FIRST-CLASS MAIL AND PERIODICALS  
SERVICE STANDARD CHANGES, 2021

Docket No. N2021-1

**MOTION OF THE UNITED STATES POSTAL SERVICE TO  
CERTIFY PRESIDING OFFICER'S RULING NO. N2021-1/9 TO THE COMMISSION,  
OR FOR CLARIFICATION OF SUCH RULING, AND FOR RELATED RELIEF  
(May 21, 2021)**

Pursuant to 39 C.F.R. § 3010.107(b), the Postal Service hereby moves for certification that interlocutory appeal, in part, of Presiding Officer's Ruling No. N2021-1/9 (POR 9) to the Commission appears to be warranted. The Postal Service believes that applicable law, policy considerations, and the facts of the situation justify modification of POR 9. Specifically, Mailers Hub should be permitted to select and propound no more than 25 interrogatories constituting separate questions calling for independent consideration and answer, rather than selecting 25 "lines of questioning" that collectively total far more than the 25 discrete questions allowed under Rule 3020.117(a). Alternatively, in the event that the Postal Service and Mailers Hub have misunderstood POR 9, the Postal Service requests appropriate clarification of POR 9, in the interest of aligning this groundbreaking ruling with Order No. 2080 and applicable case law.

**I. INTRODUCTION**

This motion, POR 9, and the underlying motions practice concern an issue of first impression: how discrete subparts should be counted for purposes of Rule 3020.117(a), which is being applied for the first time in this proceeding. Among other things, that rule

allows N-case participants to propound “no more than a total of 25” interrogatories on any other party, “[i]n the interest of expedition,” while providing that multiple subparts will not count as separate interrogatories to the extent that they are “logically or factually subsumed within and necessarily related to the primary question.” These elements of Rule 3020.117(a) are no mere technicalities; they were the “centerpiece” of the interrogatory rule, a central contributor to the Commission’s goal in Docket No. RM2012-4 of expediting N-cases, and the subject of nearly one-fifth of the pages in the Commission’s order adopting the current N-case rules. See Order No. 2080, Order Adopting Amended Rules of Procedure for Nature of Service Proceedings under 39 U.S.C. 3661 (May 20, 2014), at 36-47. As federal courts applying a functionally identical standard have found, however, the standard leaves open the questions of what constitutes a “primary question,” when subparts are or are not “logically or factually subsumed within” it, and when they are “necessarily related to” it.

This is the first N-case under the new rules, and this is the first discovery dispute testing the numerosity limit and the subpart exception. The ruling here will necessarily signal to parties in this case and future N-cases the extent to which the 25-interrogatory limit will place effective, rigorous guardrails on discovery, as the Commission expected in Order No. 2080, or whether it merely nods at discipline by limiting only the format of interrogatories, while allowing their number to remain functionally limitless. It will also establish whether Order No. 2080’s clear incorporation of federal case law applying an identical interrogatory limit will serve to guide application of Rule 3020.117(a), as the Commission intended, or whether that body of authority is effectively jettisoned at the first opportunity in favor of an amorphous, subjective approach.

This dispute depicts what is at stake. Given three chances, Mailers Hub has continued to propound a slate of distinct questions far in excess of 25. While the Postal Service welcomes the narrowing that POR 9 has brought, Mailers Hub's post-POR-9 questions still number nearly double the 25-interrogatory limit under even a charitable case-law-informed approach. Although Mailers Hub could have availed itself of alternative information sources and forms of discovery, Mailers Hub chose to use a distinctly limited form of discovery while repeatedly flouting those limits. Unless POR 9 is clarified or modified to reaffirm those limits, other parties<sup>1</sup> will perceive license to do the same.

The Postal Service does not challenge the Presiding Officer's general approach, given "the late stage of discovery," of allowing Mailers Hub to choose up to 25 interrogatories for response from a pre-established menu, rather than excusing the Postal Service from all such interrogatories outright. POR 9 at 3. The Postal Service challenges only the (admittedly implied) position that an "interrogatory," for purposes of Rule 3020.117(a)'s limit, consists of a "discrete line[ ] of questioning" "by topic," rather than a discrete question regardless of topic. *Id.* From this and the Presiding Officer's designation of 49 such "discrete lines of questioning," each of which includes multiple questions that require independent consideration and answer, the Postal Service understands that Mailers Hub is expected to choose 25 sets of questions, not 25 individual questions. Mailers Hub apparently shares that understanding: it selected 25 of the numbered "lines of questioning," but, as explained in the next section, those "lines

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<sup>1</sup> Potentially including the Postal Service, in the event that it may propound discovery on another party's rebuttal case. See Order No. 2080 at 33.

of questioning” still contain dozens more disparate questions than that. See *generally* Mailers Hub Response to Presiding Officer’s Ruling No. N2021-1/9, PRC Docket No. N2021-1 (May 20, 2021) [hereinafter “Mailers Hub POR 9 Response”].

If the Postal Service and Mailers Hub have misunderstood the intended effect of POR 9, then the Postal Service would welcome appropriate clarification from the Presiding Officer. Such clarification would likely render this motion moot, particularly if it offers clearer guidelines that may go farther to preclude or narrow future numerosity disputes. If the Postal Service and Mailers Hub have interpreted POR 9 correctly, however, then the Postal Service submits that POR 9 meets the criteria for appeal set forth in Rule 3010.107(b)(1)(i) and (ii).

The questions presented for Commission review are as follows:

- (1) Are the 25-interrogatory limit and the standard for non-discrete questions under Rule 3020.117(a) to be informed by federal courts’ practice under parallel standards, as Order No. 2080 indicated that they should?
- (2) If so, then does the application of case law require a more substantive approach to distinguishing and counting interrogatories than POR 9’s emphasis on general topics and “discrete lines of questioning” (with multiple independent questions under each “line”)?

The Postal Service submits that the answer to both questions is “yes,” and that POR 9 therefore requires modification. As modified, POR 9 should more clearly delineate each distinct question (including, within it, all non-discrete subparts) and permit Mailers Hub to choose 25 questions, not 25 variously numerous groups of separate questions.

## **II. EVEN AFTER POR 9, MAILERS HUB’S INTERROGATORIES STILL NUMBER FAR MORE THAN 25**

Before proceeding to the justification for certification under the elements of Rule 3010.107(b)(1)-(2), it may help to illustrate the issue by examining the interrogatories at hand. The Postal Service has already engaged in a lengthy analysis of Mailers Hub’s

interrogatories prior to POR 9, and most of the same questions were retained under POR 9 with little change. Motion of the United States Postal Service to Be Excused from Responding to Interrogatories Propounded by Mailers Hub, and for Related Relief (MH/USPS-T1-1-16; MH/USPS-T2-1-3; AND MH/USPS-T3-1-6), PRC Docket No. N2012-1 (May 17, 2021) [hereinafter “Postal Service Motion”], at 8-25. Given the redundancy and the pace of this proceeding, the Postal Service will not repeat that comprehensive exercise here; that portion of the Postal Service Motion may serve as a reference, to the extent that the Presiding Officer or the Commission may find it useful.<sup>2</sup>

Nevertheless, some analysis is necessary to depict the issue at hand, and to show that it is not the sort of picayune hairsplitting that Mailers Hub suggests,<sup>3</sup> but rather a straightforward matter of reading the questions. It may help to start with an example that might reasonably (albeit not necessarily) be argued to merit treatment as a single interrogatory, to serve as a reference point for the contrasting examples to follow:

MH/USPS-T1-4. [POR #4] Please refer to your testimony in section I(A)(2), Potential Improvements in Service Capability and Improved Achievement of Service Standards.

a. Please explain why the Postal Service’s regulations do not account for transit time and whether this omission was deliberate. If not, please explain why “the Postal Service’s regulations pertaining to the current three-day service standard for First-Class Mail” were adopted with this shortcoming.

b. Please confirm that “the Postal Service’s regulations” for overnight and two-day service do account for transit time. If not confirmed, please explain why not.

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<sup>2</sup> That said, if a similar table regarding Mailers Hub’s post-POR-9 interrogatories would be helpful, the Postal Service can furnish one upon request.

<sup>3</sup> See Answer of Mailers Hub to United States Postal Service Motion to Be Excused from Responding to Interrogatories (MH/USPS-T1-1-16; MH/USPS-T2-1-3; MH/USPS-T3-1-6), PRC Docket No. N2021-1 (May 19, 2021) [hereinafter “Mailers Hub Answer”], at 2-3.

Each item is separately designated, and each item contains two nominal questions. However, the leading portions of items (a) and (b) could reasonably be reframed as a single question: Do each of the Postal Service's First-Class Mail service standard regulations account for transit time? To that extent, they could be said to be “logically or factually subsumed within” a “primary question.” The other portions of items (a) and (b) could likewise be said to be “subsumed within” and “necessarily relate to” that primary question, as they essentially seek elaboration on the primary question of whether the service standards account for transit time (that is, why or why not?).

The very next item under the same header is another matter, however:

c. Please explain whether the Postal Service has evaluated only revising the current three to-five day standard to account for transit time, and/or replacing it with separate standards for three, four, and five-day service, that do account for transit time, without other changes to two-day service or the processing and transportation networks. If that evaluation has been conducted, please provide the results or, if no evaluation was made, please explain why not.

This item is not “subsumed within” or (let alone and) “necessarily related to” the primary question implied by items (a) and (b) above. Those items ask about the extent to which transit time is already accounted for in existing service standard regulations; item (c) asks whether the Postal Service has thought about a specific proposal to change service standard regulations. Although transit time is mentioned in all three items, the questions are materially distinct. There is no sensible way to organize all three into a single “primary question” that would reasonably be expected to elicit the requested information, as there arguably is for items (a) and (b) alone. Thus, of the three lettered “subparts” of “interrogatory” MH/USPS-T1-4, only two of those subparts, at most, can be counted as a single interrogatory under Rule 3020.117(a). In other words, this single,

three-part “line of questioning” actually contains a minimum of two interrogatories under the Rule 3020.117(a) standard.

This is not an isolated example. Consider another:

MH/USPS-T1-12. [POR #16] Please refer to your testimony in section III(A), Proposed Transportation Network Changes and Benefit.

a. Please explain the vehicle capacity (vehicle types and sizes) and their flexibility (i.e., option to select based on volume) that is assumed in evaluating the “efficiency” of proposed surface transportation.

b. Please confirm that your examples of “efficiency-increasing measures” noted on lines 16 through 19 imply multiple stops along a lane of surface transportation. If confirmed, please explain that statement as it compares to the transportation that is illustrated on page 11 labeled “Only 5 Steps for Future Middle Mile.” If not confirmed, please explain why not.

Item (a) concerns assumed vehicle capacity and flexibility,<sup>4</sup> whereas item (b) concerns whether lanes were assumed to have multiple stops. The two questions clearly pertain to separate subjects without a common denominator that, in contrast to MH/USPS-T1-4(a)-(b) above, might theoretically enable reframing as a single question. (As described below, case law makes it even clearer that these are separate interrogatories, given that they require independent consideration and answer, rather than merely asking for various facets of the same thing.)

As yet another example, consider the following “line of questioning” apparently treated by Mailers Hub (following POR 9) as a single interrogatory:

MH/USPS-T1-3.[POR #3] Please refer to your testimony in section I(A)(1), Discussion of Current Inability to Meet Existing Service Standards.

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<sup>4</sup> This could arguably be treated as two distinct questions: one about vehicle capacity assumptions and the other about vehicle flexibility assumptions. As relevant case law makes clear, a single sentence can contain multiple independent questions that warrant counting as separate interrogatories. See Postal Service Motion at 4. For purposes of this illustration, it is enough to note that items (a) and (b) are themselves distinct from one another, even if each item is construed – charitably – as containing no more than one question.

a. Please confirm that service performance targets and scores shown for First-Class Mail are aggregated, i.e., they are composite averages of all First-Class Mail regardless of category or preparation, and the average of performance of all reporting units (e.g., areas and districts). If that cannot be confirmed please explain why.

b. Please confirm that, within the aggregated (composite) scores, some reporting units and/or processing facilities have shown relative consistency in achieving (or failing to achieve) the current service standards. If that cannot be confirmed, please explain why.

c. Please explain what analyses or studies the Postal Service made over the 2012-2020 period to identify underperforming facilities, deficient processes, management or staffing issues, and other factors contributing to the failure to achieve service performance under the current service standards, and what corrective measures were taken. If no analyses or studies were made, or no corrective actions were taken, please explain why not.

d. Please explain whether and how the management, staffing, processing, transportation, or other factors now impairing achievement of the current standards will be amended, other than by adding time, to enable achievement of the proposed service standards.

e. Please explain whether the Postal Service has evaluated only replacing the current three to-five day standard with separate standards for three, four, and five-day service, without other changes to two-day service or the processing and transportation networks. If that evaluation has been conducted, please provide the results or, if no evaluation was made, please explain why not.

Each of these items, “even though they inquire about the same portion of testimony, nevertheless cover different topics” and are therefore “discrete.” POR 9 at 3. Item (a) essentially asks about how the target and score data is compiled and specified. Item (b) asks about well-performing units’ and facilities’ performance trends. Item (c) then asks specifically about whether the Postal Service analyzed the causes of under-performing facilities’ performance over a prior 9-year period. Item (d) asks about future plans (other than this service standards change) to address root causes of under-performance. Finally, item (e) asks whether the Postal Service has evaluated an



alternative service standards change. No combination of these can reasonably be reframed as (and hence not subsumed within) a common “primary question” that would yield the intended scope of requested information.<sup>5</sup> It is therefore difficult to understand why POR 9 would continue to group them within a single “discrete line of questioning” and treat them as if they were a single interrogatory, rather than (at least) five separate interrogatories.

As promised above, this section will not plumb each and every instance of multiplicity, but consider one final example:

MH/USPS-T3-2. [POR #3] Please refer to your testimony on page 5, lines 1 and 2 and 21 through 23.

- a. Please explain how it is determined that a truck is “routinely less than 60 percent full.”
- b. Please confirm that such a level of utilization would be in accordance with planned utilization and, if so, how the 60 percent level was chosen. If that cannot be confirmed, please explain the load that is expected “routinely.”
- c. Please explain the circumstances under which contracted transportation becomes “over and under-utilized.”
- d. Please explain what steps are taken to monitor for, and to correct over-or under-utilization of vehicle capacity; to verify that such steps were effective; and to take further actions as necessary to prevent or minimize over-or under-utilization of vehicle capacity.

As with MH/USPS-T1-4, items (a) and (b) might be argued to be “subsumed/related,” although it is debatable. Item (a) asks how the Postal Service determines the routine level of truck utilization; item (b) asks about whether its routineness aligns with Postal Service planning. These could be seen as distinct, although it might also be possible to

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<sup>5</sup> Here, too, this argument is conservative in stopping short of analyzing the distinctness of questions within each lettered item, even though that inquiry is supported by the case law discussed in the Postal Service Motion.

reframe them into a single “primary question” about how truck utilization levels are determined to be routine and thus accounted for in planning. The same cannot be said for items (c) and (d), however. Item (c) does not ask about the level, routineness, or planning of truck utilization; it asks what causes over- or under-utilization. This calls for a separate analysis from simply how the Postal Service detects truck utilization and accounts for it in its planning. And item (d) asks about the Postal Service’s processes for monitoring and correcting over- and under-utilization.<sup>6</sup> Thus, only two of MH/USPS-T3-2’s subparts appear capable of merger under the Rule 3020.117(a) standard, and the “line of questioning” contains not one, but at least three, distinct questions warranting treatment as separate interrogatories.

To be sure, some of Mailers Hub’s 25 “lines of questioning” self-evidently contain only one question, and similar to some of the examples above, still others contain intra-subpart questions and even subparts that are capable of merger into single interrogatories. But many of the “lines of questioning” still contain multiple distinct questions incapable of merger, as shown above. The Postal Service believes that a rigorous application of the case-law principles analyzed in the Postal Service Motion would show the 25 “lines of questioning” to contain as many as 84 distinct questions.<sup>7</sup>

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<sup>6</sup> Once again, this could itself be viewed as containing separate questions, as processes to monitor utilization are distinct from processes to correct it. For the sake of this illustration, however, the point remains that item (d) is distinct even if it is assumed to contain only one question.

<sup>7</sup> Even the relatively charitable, conservative approach exemplified here would yield, by the Postal Service’s count, no less than 45 distinct questions: nearly double what Rule 3020.117(a) allows.

**III. POR 9 INVOLVES IMPORTANT QUESTIONS OF LAW AND POLICY CONCERNING WHICH THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION<sup>8</sup>**

As is evident from the Postal Service Motion and the Mailers Hub Answer, there is a substantial difference of opinion as to the proper standard for counting discrete subparts. The Postal Service took the Commission at its word when it “adopt[ed] the practice of federal courts which operate under Rule 33 of the [Federal Rules of Civil Procedure (FRCP)]” as to the counting of discrete subparts. Order No. 2080 at 44 (citing *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006)) (emphasis added). As described in the Postal Service’s motion, the case law incorporated by the Commission is clear in that what matters is the number of discrete questions capable of independent answer, not merely the number of overarching “lines of questioning” into which a questioner might thematically group its interrogatories. Postal Service Motion at 4-8.

For its part, Mailers Hub acknowledges the Commission’s incorporation of federal court practice, but then claims that it is voided by a subtle distinction between Federal Rule of Civil Procedure 33(a)(1) and Rule 3020.117(a).<sup>9</sup> Mailers Hub Answer at 4. If the Commission had understood that distinction to make the difference that Mailers Hub claims, however, then the Commission would not have expressly embraced FRCP case law. Mailers Hub goes on to castigate the Postal Service’s appeal to case law as “select[ive]” and “narrow,” yet declines to point to any contrary case law supporting its preferred topical approach. Mailers Hub Answer at 4.

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<sup>8</sup> See Rule 3010.105(b)(1)(i).

<sup>9</sup> Despite its criticism of the Postal Service, Mailers Hub thus shows that it is no less capable of “put[ting] its resources toward finding technicalities that could excuse it[s] conduct[.]” Mailers Hub Answer at 3.

POR 9 substantially reduces the number of active Mailers Hub interrogatories, although, as discussed in the preceding section, it still leaves the number far above Rule 3020.117(a)'s ceiling. In doing so, POR 9 embraces Mailers Hub's topical approach based on a rather ambiguous excerpt from a single treatise. Like the Mailers Hub Answer, POR 9 contains no discussion of the case law adopted by the Commission when it established Rule 3020.117(a), let alone the case law expressly raised in the Postal Service's motion.

Also absent from POR 9 is any particularized decision about how each set of questions was "logically or factually subsumed within and necessarily related to [a] primary question." The sum total of POR 9's analysis consists of (1) a remark that Mailers Hub's interrogatories, as filed, "clearly exceed" the limit because "many" of the subparts "cover different topics," and (2) a conclusory statement that "the Presiding Officer does not concur" with the Postal Service's tally of 162 discrete questions. See POR 9 at 3. Beyond its lack of detail about the applicable standards, POR 9 contains no explanation of how the Presiding Officer decided which Mailers Hub questions to treat as discrete and non-discrete, such as might offer concrete guideposts for current and future N-case parties. POR 9 thus fails to fulfill the Administrative Procedure Act's standard of reasoned decisionmaking.

For these reasons, important questions of law remain unresolved, and substantial grounds for difference of opinion remain.<sup>10</sup>

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<sup>10</sup> The Postal Service recognizes that the topical approach may be familiar to participants in Commission proceedings. In all other types of proceedings (including prior N-cases) that lack an interrogatory limit, it does not matter how questions are counted, and topical grouping may be helpful as an organizational matter. Now, however, counting discrete questions matters in N-cases, and the Commission has expressly held that guidance should be sought in federal case law, not in Commission tradition.

And POR 9 leaves open important questions of policy. Not only does POR 9 undermine the Commission's commitment to reliance on federal case law at the first opportunity, it also undermines the Commission's commitment to narrowing the scope of interrogatories in order to accommodate an expedited procedural schedule. POR 9 reorganizes Mailers Hub's interrogatories under 49 headers, from which Mailers Hub was allowed to select 25, regardless of how many discrete questions capable of independent answer<sup>11</sup> are contained in those 25 "lines of questioning." In the end, as discussed in the preceding section, Mailers Hub chose lines of questioning that still comprise far more than 25 discrete questions and thus separate interrogatories.

In effect, POR 9 gives parties license to file an infinite number of discrete questions (without seeking leave to exceed the Rule 3020.117(a) limit), so long as they delve into no more than 25 subject areas. As discussed in the Postal Service Motion, this is not how federal courts apply FRCP 33(a)(1), and it does little to cabin discovery as the Commission intended in Order No. 2080. As such, POR 9, if allowed to stand, would undermine important policy objectives that expressly animated Order No. 2080.

For all of these reasons, POR 9 raises important issues of law and policy and does not resolve the matter in a way that removes substantial grounds for a difference of opinion.

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<sup>11</sup> This is the standard set forth and elaborated upon in case law under FRCP 33(a)(1), as discussed in the Postal Service's motion and controverted in neither Mailers Hub's response nor POR 9.

**IV. IMMEDIATE APPEAL WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE PROCEEDING, AND SUBSEQUENT REVIEW IS AN INADEQUATE REMEDY<sup>12</sup>**

The dispute concerns discovery requests that are outstanding, and resolution of it will determine whether other participants have already exceeded their own interrogatory limits under Rule 3020.117(a) or will do so during the period for follow-up discovery. The Commission has decided that limited interrogatories are important to allowing N-cases to be completed expeditiously. Rule 3020.117(a) (establishing the interrogatory limit “[i]n the interest of expedition”); Order No. 2080 at 46. The Commission has acknowledged that enforcing these limits, while ensuring an adequate record, would require it “to participate even more actively in managing N-case discovery,” and that it was “prepared to accept that burden in order to ensure that both objectives are achieved.” Order No. 2080 at 47. In order to advance termination of this proceeding in the manner that the Commission intended in Order No. 2080, the Commission must weigh in on the extent to which Rule 3020.117(a) will provide effective guardrails to cabin interrogatories.

Subsequent review will not provide an adequate remedy. There is no clear opportunity for subsequent Commission (or judicial) review in this context. Moreover, Commission guidance is necessary now, in order to determine the extent to which the Postal Service is required to respond to pending discovery by Mailers Hub and potential follow-up interrogatories by other parties.

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<sup>12</sup> See Rule 3010.107(b)(1)(ii).

## **V. POR 9 SHOULD BE MODIFIED<sup>13</sup>**

As discussed in section I above, POR 9 does not account for the policies underlying Rule 3020.117(a) or for the relevant body of case law that the Commission expressly adopted in Order No. 2080. While it helpfully reduces the number of discrete Mailers Hub questions outstanding, that number still intolerably exceeds the limit in Rule 3020.117(a). Worse still, POR 9 offers no limiting principle to contend with the factual likelihood that other parties will propound even more excessive interrogatories, so long as they are grouped under no more than 25 topical headers. The policy arguments are discussed in the preceding sections; the sections that follow will focus on legal and factual arguments.

### **A. Without Any Attempt at Conformity, POR 9 Undermines Order No. 2080 and the Case Law Adopted by the Commission**

In relevant part, Rule 3020.117(a) provides as follows (with emphasis added):

In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant in a proceeding may propound to any other participant no more than a total of 25 written, sequentially numbered interrogatories, by witness, requesting non-privileged information relevant to the subject matter of the proceeding. An interrogatory with subparts that are logically or factually subsumed within and necessarily related to the primary question will be counted as one interrogatory.

The underlined phrases highlight salient aspects of this provision.

First, interrogatories can number no more than 25, and that limit applies at the level of the responding party, not of each individual witness. See Order No. 2080 at 38 (the limit applies to interrogatories propounded “on the Postal Service” and “for all

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<sup>13</sup> See Rule 3010.105(b)(2) (“Such requests shall also state in detail the legal, policy, and factual arguments supporting the participant's position that the ruling should be modified.”).

witnesses, as well as institutional interrogatories directed to the Postal Service”); see also *id.* at 38 n.35, 41 n.36 (confirming parties’ understanding to that effect).

Second, the limit is intended to expedite N-cases. The Commission consciously adopted the limit as an important tool to tighten what had been “the most time-consuming phase of N-cases.” *Id.* at 46. “With the limit, participants will have a clear incentive to limit the number of interrogatories they serve. Without the limit, there is little incentive, if any, to pare back the number of interrogatories they propound.” *Id.*

Third, the Commission established an express standard for when an interrogatory’s subparts would be treated as a single interrogatory: they must be “logically or factually subsumed within and necessarily related to the primary question.” For the carefully selected qualitative standard to do any work, it cannot be that any numbered header (particularly one lacking a “primary question”) with an infinite number of subparts on the same general topic automatically and always constitutes a single interrogatory. The obverse of the second sentence of Rule 3020.117(a) is that a putative interrogatory may have subparts that are treated as separate interrogatories, regardless of how the proponent styled them.

The question is how to distinguish discrete from non-discrete subparts. In this vein, the “logically or factually subsumed” standard adopted in Rule 3020.117(a) is generally understood to raise interpretive questions of its own. See Order No. 2080 at 44 (declining commenters’ requests to clarify “necessarily” and “primary question”); *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685 (D. Nev. 1997) (adopting the same standard as Rule 3020.117(a) but noting that “the more difficult question” was how to apply it).



Order No. 2080 offers two pointers to help fill the gap. For one thing, the subpart-merger rule is intended to avoid “unfairly restricting” discovery, lest a party’s limit be exhausted by interrogatories that seek merely descriptive details of a given thing: for example, “an interrogatory that asked for a witness’s (a) name; (b) address; (c) telephone number; and (d) e-mail address” ought to count as a single interrogatory. Order No. 2080 at 43; *accord* FRCP 33 advisory committee’s note (1993) (“[A] question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.”); *Kendall*, 174 F.R.D. at 686 (date of, nature of incident underlying, and name, gender, position, and address of person delivering warning/reprimand; date, show, labor list, and person administering labor call and drafting labor list showing that Plaintiff was called to work and declined). While Order No. 2080 offers an example of subparts that should be treated as a single interrogatory, however, it offers no such guidance as to when subparts should not.

To that end, Order No. 2080’s second pointer is more general, but potentially even more helpful.

As urged by the Postal Service, this formulation [of the subpart rule] will adopt the practice of federal courts which operate under Rule 33 of the FRCP. *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006) (noting “courts generally agree that ‘interrogatory subparts are to be counted as one interrogatory . . . if they are logically or factually subsumed within and necessarily related to the primary question.’ [citations omitted].”).

Order No. 3020 at 44. The “urg[ing]” to which the Commission favorably responded was specifically that “such explicit recognition will provide ‘transparency about the standards and precedents that may be brought to bear on matters concerning the 25-interrogatory limit.’” *Id.* at 43 (quoting United States Postal Service Initial Comments,

PRC Docket No. RM2012-4 (July 29, 2013), at 40). In other words, rather than create a blank slate, the Commission chose an off-the-shelf subpart rule with the express intention of incorporating guidelines from an existing body of case law. Indeed, adopting a time-tested set of ground rules, rather than having to create its own precedent from scratch through discovery dispute resolution, is entirely in keeping with the Commission's aim of keeping discovery motions practice within reasonable bounds and streamlining N-cases. See *id.* at 45 (expressing confidence that the new interrogatory limit would not result in an "unacceptably high increase" in discovery motions).

Thus established that case law bears on the question of when subparts should and should not count as separate interrogatories, the inquiry then turns to what the case law has to say about that question and about the interrogatories at hand. The Postal Service has discussed at length how, under relevant case law, the "logically or factually subsumed" standard boils down to whether questions merely deal with different facets of a given thing, or whether they call for independent consideration and answers, regardless of whether they deal with the same general topic. Postal Service Motion at 3-8. Because neither Mailers Hub nor POR 9 offered any rebuttal of this summary of relevant case law, the Postal Service incorporates and reasserts it here.

Mailers Hub objects to the use of FRCP case law altogether. Mailers Hub Answer at 3 ("Whatever the practice in Federal Courts, this approach is inappropriate for an agency proceeding that welcomes participation from the broader public."). The Commission decided otherwise when it adopted the current rules, and Mailers Hub presents no contrary analysis of the case law itself.

For its part, POR 9 contents itself to quote a single treatise that does little more than restate the ambiguous standard, without detailing how it is to be applied in practice. POR 9 at 3 (quoting CHARLES A. WRIGHT & ARTHUR R. MILLER, 8B FED. PRAC. & PROC. § 2168.1 (3d ed. 2002)). Courts have treated this quote from Wright and Miller as a starting point to discussion and application of the standard, not as its conclusion. For example, the court in *Safeco of America v. Rawston* presented the same quote, before proceeding to a exegesis on the “easily answered” question of whether subparts must be separately numbered to count as multiple interrogatories (they do not) and the “more difficult question” of “when differences in the information sought should render subparts ‘discrete.’” 181 F.R.D. 441, 444 (C.D. Cal. 1998). Clearly, the Wright and Miller quote does not answer those questions – the questions implicated here – or else the court’s extensive analysis would have been superfluous. But POR 9 stops short of drawing from that analysis (despite the Postal Service’s quotation of it), or analysis by other courts, despite its direct relevance and the Commission’s express instruction to look to those sources.

The Postal Service then presented a lengthy analysis applying that case law to Mailers Hub’s refiled interrogatories, finding that they totaled 162. Postal Service Motion at 8-25. To this, Mailers Hub responded by quibbling with the Postal Service’s finding of eight distinct questions within a putatively single interrogatory (former MH/USPS-T2-3(a)-(e)). Mailers Hub Answer at 2-3. The insufficiency of that argument is no longer an issue, however: the matter at hand is POR 9 and the questions that follow it. As explained in section II above, even a reasonably charitable reading of

Mailers Hub's post-POR-9 questions would identify more than 25 discrete interrogatories.

As noted above, POR 9 does not acknowledge any of the relevant case law, and so it is unsurprising that it does not apply it. Instead, POR 9 invents a standard not grounded in Rule 3020.117(a), Order No. 2080, or any FRCP case law: a proponent may engage not in 25 discrete questions, but 25 "discrete lines of questioning" "by topic." POR 9 at 3. The shortcomings of that approach are detailed in section II above. Despite trimming the list somewhat, POR 9 does not appear to grapple with the fundamental point: what counts is not the number of numbered headers, which is an artifice of formatting and can easily be gamed, but how many disparate inquiries within those headers call for distinct responses.

As noted at the outset of this motion, it is possible that the Postal Service has misunderstood POR 9, and that the Presiding Officer intended that Mailers Hub should select 25 distinct questions, rather than 25 "discrete lines of questioning." If that is the case, then the Postal Service will gladly accept clarification to that effect in lieu of appeal to the Commission.

**B. The Facts Surrounding This Discovery Dispute Do Not Justify a Problematic Interpretation of Rule 3020.117(a) or Warrant Leniency to Mailers Hub or Penalty to the Postal Service**

A portion of POR 9 is devoted to admonishing the Postal Service for a perceived lack of informal engagement with Mailers Hub prior to filing the motion, implying that this perception may have played some role in the ruling. POR 9 at 2 n.3, 4. However, neither Rule 3020.105 (governing motions to be excused) nor Order No. 2080 conditions application of Rule 3020.117(a) on the level of pre-motion informal engagement or makes a lack of such engagement a factor for decision. As the

proponent of its interrogatories, Mailers Hub is responsible for ensuring that those interrogatories comply with Commission rules, see Order No. 2080 at 42 (“In no event will a participant be able to serve more than 25 interrogatories without prior Commission approval.”), and the Postal Service is entitled to seek excusal from interrogatories that pose an undue burden by exceeding the cap. Informal engagement and negotiated resolution should be pursued and welcomed by all in the interest of conserving resources, but the Commission’s rules do not accord it any role in the Presiding Officer’s application of those rules.

For what it is worth, Mailers Hub shares responsibility for the lack of informal resolution in this particular instance. The Postal Service did engage informally with Mailers Hub about the numerosity of the original set of interrogatories. Postal Service Motion at 2. Like other parties with whom the Postal Service has engaged in similar informal dispute resolution, a prompt and collegial multi-email exchange ended with Mailers Hub’s agreement to withdraw and refile its interrogatories; unlike other parties, however, Mailers Hub did not, in fact, engage the Postal Service to secure a shared understanding about what it would file prior to doing so.<sup>14</sup> Cf. Douglas F. Carlson Notice of Withdrawal of Certain Interrogatories and Requests for Production of Documents to the United States Postal Service, PRC Docket No. N2021-1 (May 6, 2021), at 2. Rather, Mailers Hub unilaterally filed a comparable battery of inquiries in different groupings. Given Mailers Hub’s maintenance of a grossly excessive number of interrogatories despite the Postal Service’s outreach, and given the short timeframe for

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<sup>14</sup> Mailers Hub’s belated offer “to discuss individual interrogatories . . . to determine if they can be further limited” therefore rings somewhat hollow. See Mailers Hub Response at 1.

motions to be excused, the Postal Service reasonably concluded that it would not be productive to prolong matters by re-engaging Mailers Hub to resolve it. Instead, the matter seemed ripe for clarification from the Presiding Officer, not only for this context, but more generally for other participants whose questioning bordered on exceeding the interrogatory limit. (Unfortunately, POR 9 falls short of providing the hoped-for clarity, hence this motion.)

Mailers Hub also did not contact the Postal Service to pursue a mutually agreeable informal resolution after the Postal Service filed its motion, as at least one other party has successfully done. See *generally* Notice of United States Postal Service Withdrawing Motion to be Excused from Responding to Greeting Card Association Interrogatory GCA/USPS-T2-2(b), PRC Docket No. N2012-1 (May 20, 2021); Greeting Card Association Revised Interrogatory to United States Postal Service Whiteman, PRC Docket No. N2012-1 (May 19, 2021). Instead, Mailers Hub apparently focused on preparing and filing its Answer, as it is entitled to do. The Postal Service does not begrudge Mailers Hub that procedural right or assert that Mailers Hub deserves an adverse inference for failing to pursue informal resolution; by the same token, however, no adverse inference should be imposed upon the Postal Service for availing itself of an available channel for formal resolution under these circumstances.

It may be unfortunate that the dispute over Mailers Hub's interrogatories here was not resolved in as collaborative a fashion as other disputes in this proceeding. But it is unfair to suggest that the Postal Service is solely or even predominantly responsible for the repeatedly high volume of Mailers Hub's questions. Still less is it a reason to

issue a ruling with such potentially sweeping implications for practice under the new N-case rules.<sup>15</sup>

**VI. GOOD CAUSE EXISTS TO STAY THE INTERROGATORY RESPONSE DEADLINE PENDING RESOLUTION OF ANY APPEAL**

This motion and the motion that underlies it concern a matter of first impression regarding a “centerpiece” of the Commission’s new N-case rules and implicating significant legal and policy issues. Order No. 2080 at 36. It is important to get it right, and to explain the reasoning why, not only for the sake of the Postal Service, Mailers Hub, and other parties who may have exceeded or may soon exceed the interrogatory limit, but for the sake of parties in future N-cases who may look to POR 9 for guidance.

At the same time, this motion also concerns pending discovery that is on a very short schedule. If the Postal Service prevails on appeal, then Mailers Hub would presumably have to select a smaller range of questions than permitted under POR 9. Yet if the Postal Service is required to respond before the appeal is resolved (potentially in its favor), its witnesses will already have had to use scarce time to answer an unduly broad set of questions from this one party. To avoid prejudice to the Postal Service, cause exists to stay the deadline for response to Mailers Hub’s selected interrogatories until a reasonable time following resolution of any appeal (either upon certification of this motion or upon direct appeal under Rule 3010.107(c)).<sup>16</sup>

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<sup>15</sup> Mailers Hub claims that the Postal Service has not voluntarily provided sufficient information and that this justifies excessive interrogatory requests. Mailers Hub Answer at 5-6. Such a generalized assertion cannot be sufficient to justify avoidance of Rule 3020.117(a), or else the exception would swallow the rule. It is also worth noting that the Postal Service had no opportunity to counter Mailers Hub’s assertion here, as it would have if Mailers Hub had more properly borne the burden of justifying its excessive interrogatory requests through a motion for extraordinary relief from the rule’s limitation. See Order No. 2080 at 42.

<sup>16</sup> To the extent that a stay might result in responses being filed after the time provided for hearings, the Postal Service is confident that provision can be made for belated designation of responses as written cross-examination. Although the Postal Service does not believe that Mailers Hub would be materially

Alternatively, if a stay is not granted, the Postal Service submits that any required response to Mailers Hub's still-excessive questions should not be construed to render this motion or any further appeal moot. In this matter, the Commission is not bound by the standing requirements that the U.S. Constitution imposes on Article III courts; it is free to render advisory opinions in the interest of clarifying the application of its rules. Given the value in resolving this question of first impression, the need to provide guidance for parties and the Presiding Officer in this and future N-cases, and the important policy motives expressed in Order No. 2080, the questions raised in motion warrant resolution by the Commission, rather than allowing POR 9 to stand unquestioned on mootness grounds. This is truly an exceptional instance where the issue is capable of repetition – perhaps in very short order, through follow-up discovery – while evading review due to the very short timeframes for resolution of any further discovery disputes.<sup>17</sup> As such, if the Postal Service remains required to respond to Mailers Hub's contested interrogatories, such response will be under protest and should not be deemed to prejudice to the Postal Service's right to pursue this motion or any appeal.

## **VII. CONCLUSION**

For the foregoing reasons, the Postal Service respectfully requests that the Presiding Officer either (1) clarify that POR 9 is intended to permit Mailers Hub to select

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prejudiced by a stay of the response deadline, it bears noting that this dispute has only reached this point because Mailers Hub failed to avail itself of repeated opportunities to negotiate with the Postal Service, to reconsider the number of discrete interrogatories it has propounded, and/or to employ an alternative discovery approach. See POR 9 at 4 n.7.

<sup>17</sup> "Capable of repetition yet evading review" is the standard that courts use to determine when a case may be decided notwithstanding its immediate mootness, such as in cases of labor-management disputes, election disputes, and government contract and grant awards. WRIGHT & MILLER, 13C FED. PRAC. & PROC. § 3533.8.



25 distinct questions (not 25 “lines of questioning”), or else (2) grant this motion and certify this appeal of POR 9 to the Commission. In the latter event, the Postal Service further requests that the Presiding Officer stay the deadline for response to any Mailers-Hub-selected interrogatories until a reasonable time following resolution of any appeal under Rule 3010.107(b)-(c).

Respectfully submitted,

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